

AMENDED OPINION: CONDITION NO. 3

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6258

PETITION OF JOSEPH LUTCH

(Hearing held September 3, 2008)

(Worksessions held October 8, and December 3, 2008)

OPINION OF THE BOARD

(Effective date of Opinion, January 15, 2009)

This proceeding is a petition pursuant to Section 59-A-4.41 of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for variances from Section 59-C-1.323(b)(1). The petitioner proposes the construction of one-story addition/garage that requires variances of two and seven tenths (2.7) feet as it is within five and three tenths (5.3) feet of the side lot line setback and ten (10) feet as it reduces the sum of both side yards to fifteen (15) feet. The required side lot line setback is eight (8) feet and the required sum of both side yards is twenty-five (25) feet.

The subject property is Lot 3, Block 47, Kemp Mill Estates Subdivision, located at 809 Kersey Road, Silver Spring, Maryland, 20902, in the R-90 Zone (Tax Account No. 01333464).

Decision of the Board: Requested variances **Granted.**

EVIDENCE PRESENTED TO THE BOARD

1. The petitioner proposes the construction of a 14 x 34.4 foot one-story addition/garage.
2. The petitioner testified that the requested variances are not solely based upon the unique features of his lot, but that the lot's features create a hardship in its use for his wife. The petitioner testified that his lot's topography slopes upward from that street and that the house is sited on a hill. The petitioner testified that the topography also slopes upward from the lot's side yards. The petitioner testified that the topography of his lot is a characteristic shared with other lots in the neighborhood.

3. The petitioner testified that his wife had a coccyx fracture approximately a one year and half ago. The petitioner testified that as a result on this fracture his wife has extreme difficulty ascending and descending stairs and that it takes her a good deal of time to go from sitting to standing. The petitioner testified that because of his wife's condition she is in a great deal of pain. A letter from Dr. Cohen was entered into the record confirming his wife's condition. See Exhibit No. 11 [letter from Dr. Ruth Keveess-Cohen dated 8/28/08].
4. The petitioner testified that the proposed construction would provide a level and covered entry into their home. The petitioner testified that the proposed addition would be for a single car and would also provide an area for storage.
5. The record was re-opened at the Board of Appeals' Worksession held on December 3, 2008, to include a letter dated November 23, 2008 requesting reconsideration from Mr. Lutch. The request for reconsideration was granted. Mr. Lutch testified at the Worksession that his wife's condition has worsened.

STANDARDS FOR EVALUATION

Based upon the petitioner's binding testimony and the evidence of record, the Board finds as follows:

The requested variances do not comply with the applicable standards and requirements of the Montgomery County Zoning Ordinance set forth in Section 59-G-3.1. However, the Board finds that the variances can be granted as a reasonable accommodation of the petitioner's wife's disability under Title II of the Americans With Disabilities Act (ADA) and the Fair Housing Amendments Act of 1988 (FHAA) provisions.

Determination of Disability

The ADA and FHAA define a person's disability, or handicap, in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(2)(A); 42 U.S.C. §3602(h).

Whether an individual has an impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001) (citations omitted).

Prohibition on Housing Discrimination Based on Disability

The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibits discrimination against "any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" on the basis of that person's handicap. 42 U.S.C.A. §

3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodations in “rules, policies, practices or services when such accommodation may be necessary to afford” a person with a handicap “equal opportunity to use and enjoy a dwelling.” 42 U.S.C.A. § 3604(f)(3)(B). A “necessary accommodation” to afford “equal opportunity” under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation “will be denied an equal opportunity to enjoy the housing of their choice.” [See *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. v. City of Taylor*, 102 F3d 781, 795 (6th Cir. 1996).] A failure to make a reasonable accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. at 497 (citing *Smith*, 102 F.3d at 794-96).]

Reasonable Accommodation by Local Government of an Individual’s Disability

The “reasonable accommodation” provision of the FHAA has been interpreted to require municipalities to “change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities.” [See *Trovato*, 992 F. Supp. at 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996)).] Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an “activity” of a public entity within the meaning of the ADA. [See *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n. 16 (citing *Trovato*, 992 F.Supp. at 497).]

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications “would fundamentally alter the nature of the service, program or activity.” 28 C.F.R. §35.130(b)(7) (1997). Therefore, unless the proposed accommodation would “fundamentally alter or subvert the purposes” of the zoning ordinance, the variance must be granted under Title II of the ADA. [See *Trovato*, 992 F.Supp. at 499.]

Findings of the Board

Based on the above, the Board must make the following findings:

1. Determination of disability: An evaluation of whether a disability exists under the ADA or FHAA requires a three-step analysis. The applicant’s medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking, independent mobility) and the Board must determine whether it constitutes a major life activity under the ADA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).
2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.

3. Reasonable modification of local government policies: Because zoning ordinances are among the varieties of local government rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance must be granted in order to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the zoning ordinance.

Applying the above analysis to the requested variance, the Board finds as follows:

1. The Board finds that the petitioner's wife's mobility issues demonstrate that the petitioner's wife major life activities are restricted. Because of the direct impact this impairment has on his wife's major life activities, the Board finds that a disability exists pursuant to the definitions in the ADA and FHAA. The Board finds that the proposed construction of a one-story addition/garage would permit the petitioner's wife a safe, level and covered access to the home.
2. The Board finds that the proposed one-story addition/garage will not undermine the intent of the zoning ordinance. Additions/garages added to existing homes are commonly found in residential areas such as the R-60 Zone in which the subject property is located, and are consistent with the intent of the zoning ordinance to promote a residential scale in residential zones. Accordingly, the proposed construction will not impair the intent, purpose, and integrity of the general plan affecting the subject property.
3. The Board finds that on the basis of new facts in the petitioner's letter dated November 23, 2008, Condition No. 3 of the Board's Opinion will be deleted.

Therefore, based upon the petitioner's binding testimony and the evidence of record, the Board finds that the grant of the requested variances are a reasonable accommodation of the petitioner's wife's disability because (1) it will not fundamentally alter or subvert the purposes of the zoning ordinance; and (2) the proposed construction is necessary to permit the petitioner's wife a safe, level and covered access to her home.

Accordingly, the requested variances of two and seven tenths (2.7) feet from the required eight (8) foot side lot line setback and of ten (10) feet from the required twenty-five (25) foot sum of both side yards are **granted** subject to the following conditions:

1. The petitioner shall be bound by all his testimony and exhibits of record, to the extent that such evidence and representations are identified in the Board's Opinion granting the variances.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 4 and 5(a) through 5(f).

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above is adopted as the Resolution required by law as its decision on the above entitled petition.

Board member David K. Perdue was necessarily absent and did not participate in this Resolution. On a motion by Catherine G. Titus, seconded by Carolyn J. Shawaker, with Walter S. Booth and Allison Ishihara Fultz, Chair, in agreement, the Board adopted the foregoing Resolution.

Catherine G. Titus
Vice Chair, Montgomery County Board of Appeals

I do hereby certify that the foregoing
Opinion was officially entered in the
Opinion Book of the County Board of
Appeals this 15th day of January, 2009.

Katherine Freeman
Executive Secretary to the Board

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve-month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.